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IN THE

Supreme Court of the United States

MEHRDAD SABZEVARI, PETITIONER

v.

THE RELIABLE LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reply BRIEF

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INTRODUCTION

Respondent spends approximately 26 pages arguing against this Court granting certiorari, and yet it completely fails to address the heart of Petitioner's arguments. Respondent offers two Counter-Statements of Questions presented and yet it fails to offer any relevant arguments for this Court's consideration of the petition to grant certiorari. Finally, in an act of desperation, Respondent offers two alternatives for denying the certiorari petition, which were used by the District Court, that so flagrantly ignore the law that even the Fifth Circuit refused to use it in its opinion.

The two key questions for this Court are: i) whether there is competent summary judgment evidence that a jury could infer that Respondent violated Petitioner's Title VII rights; and ii) If an employee quits a position, must a court still consider whether the employee was constructively discharged. If the answer to the first question is yes, then the opinion from the Court of Appeals for the Fifth Circuit contradicts the law of the land, violates Petitioner's right to a trial by a jury of his peers and must be overturned by this Court. If the answer to the second question is yes, then the opinion from the Court of Appeals for the Fifth Circuit must be overturned, because it contradicts all of the law and opinions that pertain to constructive discharge.

Respondent's Statement of the Case

On page 1 of its Opposition Brief (hereinafter "Opposition"), Respondent accuses Petitioner of misleading this Court by using facts that are

"inaccura[te]," "immaterial" and of "omi[ting]... critical undisputed facts." After leveling such a charge, Respondent completely fails to support its incredulous allegations against the undersigned. As demonstrated below, it is actually the Respondent who is ignoring key undisputed facts and who is misleading this Court.

On page 3 of its Opposition, Respondent claims that Mr. Don Hirschfeld, made the decision to promote Mr. Doug Dixon. Claiming that Mr. Hirschfeld made the decision to promote Mr. Dixon is misleading, as Respondent has NEVER refuted the testimony that Mr. Grant Pillow was the ultimate decision maker and was the one who approved Mr. Dixon's promotion. (R. 457 and 500).

Also on page 3 of its Opposition, Respondent states that "Petitioner...admittedly does not believe that [Mr.] Hirschfeld discriminated against him in the selection process for the Sikeston Job...". The Sikeston job is the District Manager position that Mr. Dixon received. By focusing on this part of the testimony, Respondent is omitting the fact that Petitioner was told that decisions about promotions were made by Mr. Pillow and NOT Mr. Hirschfeld. (R. 457). Furthermore, Respondent is completely ignoring the statement by Petitioner's manager that the reason Mr. Dixon got the promotion was "because [Respondent] had more 'white managers' working for them." (Id.).

On page 4 of its Opposition, Respondent gives a long list of qualities that it claims "are indisputably central to the qualifications of a district manager." Once again this is misleading, as Respondent wants to compare apples to oranges. Petitioner is discussing the

qualifications of a District Manager. Mr. Pillow testified that there are "two important functions for [a District Manager]. One is taking care of the employees and policy holders and two, being able to recruit." (R. 501). Mr. Pillow went on to say that neither function was more important than the other. (Id.). Likewise, it has never been refuted that the person who made the ultimate decision, Mr. Pillow, stated that he would not want a District Manager that had a history of ethical violations, company rule violations OR a history of a lack of recruitment. (R. 501-3). Therefore, based on the undisputed testimony of the ultimate decision maker, to be **qualified** for a district manager a candidate must not have any of the following: a history of i) ethical violations; ii) company rule violations; or iii) a lack of recruitment.

Also on page 4 of its Opposition, Respondent claims that, "Petitioner did not receive the transfer to Austin that he requested." (Citing to page 325 of the record). Even ignoring that there is no such evidence on page 325 of the record, Respondent is completely omitting the fact that Petitioner's request to transfer back to Austin was in fact approved. (R. 458). It was only after Petitioner began raising his Title VII complaints and after Respondent instituted a policy of promoting Hispanics and African Americans over other races[1] that the transfer was withdrawn. (Id.). When Petitioner questioned why the transfer approval was being revoked, he was told by Mr. Mike Wheeler, Petitioner's

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[1] The undersigned humbly reminds this Court that it was Respondent's discriminatory policy that led to a consent decree being signed by Judge Werlien in EEOC v. The Reliable Life Insurance Company, Civil Action NO. H-03-01180.

regional manager at the time, that Petitioner was a traitor for raising his complaints and Mr. Wheeler threatened Petitioner's career. (Id.).

On page 5 of its Opposition, Respondent claims that, "the record contains no evidence that the Austin [transfer]...would have involved a change in...some...other objective aspect of Petitioner's employment with Respondent." However, Respondent completely omits the evidence that Petitioner was being subjected to a hostile environment in Beaumont and the objective evidence that i) Petitioner's evaluation took a "suspicious" downward trend; ii) Petitioner was called a traitor; iii) Petitioner's career was threatened; and iv) Petitioner was told to move within the district or be demoted. (R. 457, 531 and 458).

On page 6 of it Opposition, Respondent claims that Petitioner's charge of discrimination alleges "national origin discrimination and retaliation based on: (1) the denial of Petitioner's transfer...; and (2) Respondent's requests that Petitioner live within 25 miles of the Beaumont office...." However, the original charge also discusses Respondent's promotion practices. (R. 298). In fact, there was sufficient information in the charge that Respondent addressed Petitioner's failure to promote claim in its position statement. (R. 470-1).

On page 7 of it Opposition, Respondent repeats a completely unsupported charge that was raised in the Fifth Circuit. Respondent falsely claims that Petitioner "limited the scope of his retaliation claim to [the] denial of the transfer to Austin and his termination" in his response to Respondent's Amended Motion for Summary Judgment. Opposition page 7 fn1.

Respondent is misquoting the brief and thereby intentionally misleading this Court. Respondent has omitted the footnote that expressly states that "[t]his also does not include the hostile environment and the sudden decrease in Mr. Sabzevari's evaluation." (R. 448). Furthermore, in the very next paragraph Petitioner went on to say:

> Contrary to Defendant's allegation, Mr. Sabzevari's transfer to Austin was not a "purely lateral transfer." After being subjected to a hostile environment in Beaumont by being ostracized, labeled as a trouble maker (Other employees were told to stay away from Mr. Sabzevari if they wanted to keep their jobs.), and being told to move or be demoted, Mr. Sabzevari believed that moving to Austin would provide him a more secure future and one free of harassment.

(R. 448).

Reply to Respondent's Reasons for Denying Certiorari

I. Criteria of Supreme Court Rule 10 are satisfied.

Respondent's spends the majority of its Response trying to frame Petitioner's writ as nothing more than a factual dispute. On Page 12, it goes so far as to claim that "Practically speaking, Petitioner seeks certiorari for no other reason that to have this Court wade through the record in search of a genuine issue of material fact...that both the Court of Appeals and District Court could not find." However, this is not the

case. There are no factual disputes in a summary judgment. All disputed facts are to be taken in favor of the non-movant. *Adickes v. S.H. Kress &Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). What is amazing is that instead of applying the law to the facts presented in Petitioner's Petition for Writ of Certiorari, Respondent dismisses all the facts and makes conclusionary arguments that Petitioner has failed to raise a genuine issue of material fact. Without even attempting to apply the law to the facts, Respondent's arguments lack credibility and are not relevant to this Court's determination of whether to grant certiorari, as it did in *Reeves v. Sanderson Plumbing Products, Inc.*, to correct the Fifth Circuit's weighing of evidence, which denied Petitioner his 7th Amendment Right to a trial by a jury. 120 S.Ct. 2097 (2000).

II. The Court of Appeals failed to apply well settled law as Petitioner did raise a genuine issue of material fact on his failure to promote claim and retaliation claims.

A. There is a genuine issue of a material fact pertaining to Petitioner's failure to promote claim.

Respondent spends six and half (6½) pages discussing Petitioner's failure to promote claim. However, instead of addressing the evidence presented to the District Court and the Fifth Circuit that according to the ultimate decision maker, Mr. Dixon was disqualified to be a District Manager because Mr. Dixon had a history of ethical violations, company rule violations AND[2] a history of problems with recruiting.

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[2] According to Mr. Pillow any one of the problems would disqualify

Respondent relies on the conclusion of the Fifth Circuit that Petitioner failed to offer any "evidence of a company policy or past promotional decision to support the unfounded conclusion that these remote infractions forever rendered [Mr.] Dixon ineligible for a district manager position...." Opposition page 17. However, this is exactly what the evidence of Mr. Pillow does, it disqualifies Mr. Dixon because he had a history of being a problem employee[3]. A reasonable jury could infer from this evidence that Mr. Dixon was disqualified from the promotion. This would invalidate Respondent's proffered reason of the promotion of Mr. Dixon over Petitioner, and conclude as Petitioner's manager did, that the only qualification that Mr. Dixon had was that he was white.

B. There is a genuine issue of a material fact pertaining to Petitioner's retaliation claim.

Respondent's opposition to granting certiorari on Petitioner's retaliation claims stems from its belief that there is no evidence of an adverse employment action. Respondent concludes that the transfer to Austin was a purely lateral transfer and that Petitioner has offered no objective evidence to the contrary. Petitioner did offer the subjective evidence that he believed that his career would be more secure in Austin than in Beaumont and that a transfer would remove him from

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Mr. Dixon, and yet he was promoted when he had all three, and Petitioner had none.

[3] As this Court recalls, Mr. Dixon's problems were not remote and in fact he had been warned, right before he was promoted, that if his recruiting problems did not get resolved he would be placed on probation.

the hostile Beaumont environment. However, Petitioner also offered the objective evidence that after he raised his concerns i) Petitioner's evaluation took a "suspicious" downward trend; ii) Petitioner was called a traitor; iii) Petitioner's career was threatened; and iv) Petitioner was told to move within the district or be demoted. (R. 457, 531 and 458). Furthermore, Petitioner's subjective belief is also supported by the fact that within a few months of raising his complaints, he was no longer working for Respondent.

Respondent only addresses Respondent's demand that Petitioner move closer to the district or be demoted. Opposition page 21. However, this move or be demoted policy was supported only through verbal testimony of current employees of Respondent. The verbal move or be demoted policy relied on by the Respondent and the Fifth Circuit, was and is disputed by Petitioner. By taking the Respondent's oral version over Petitioner's testimony, the Fifth Circuit improperly weighed the testimony and rejected Petitioner's version. However, a reasonable jury could believe Petitioner and infer that the demand for Petitioner to move was in direct response to his raising Respondent's Title VII violations. Therefore, the Fifth Circuit, without even addressing this evidence, violated the law of the land and this Court must grant certiorari and reverse the Firth Circuit's opinion.

III. The Court of Appeals failed to analyze Petitioner's wrongful termination claim under the doctrine of Constructive Discharge.

Once again Respondent is missing the heart of Petitioner's argument. Petitioner argues that he was

fired, but that if he "quit" he was constructively discharged, as no reasonable person would continue working in such a hostile environment. Respondent argues that Petitioner quit. The Fifth Circuit agreed with Respondent and ruled that Petitioner effectively quit. However, the Fifth Circuit ended its analysis at determining that Petitioner effectively quit. Petitioner's argument is that under the constructive discharge doctrine, the Fifth Circuit should have to consider whether a reasonable person would have continued working in such a hostile environment[4]. Since Petitioner did present competent summary judgment evidence, that a reasonable jury could infer that he was subjected to a hostile work environment, the Fifth Circuit's opinion contradicts the law of the land regarding constructive discharge and must be overturned.

IV. Petitioner's failure to promote and wrongful discharge claims were before the Equal Employment Opportunity Commission.

Respondent argues that there are alternate grounds to deny the Writ of Certiorari in that the Fifth Circuit could have affirmed the granting of summary judgment on the same basis of the District Court. (Opposing Brief, pages 18 and 26). Respondent argues that the District Court correctly held that Petitioner did not timely submit his failure to promote claim or wrongful discharge claim to the EEOC. This argument is not based on the law or facts of this case.

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[4] Petitioner does not dispute that if the trier of fact determines that Petitioner was not subjected to hostile environment, he cannot maintain a constructive discharge claim.

The claims before the District Court were not limited to the "exact charge" filed with the EEOC. *Young v. City of Houston, Texas*, 906 F.2d 177, 179 (5th Cir. 1990). Any claims that reasonably flowed from the EEOC investigation of the Petitioner's EEOC charge were properly before the District Court. Id. The purpose of the charge is to provide notice of a complaint, promote voluntary compliance and conciliation of disputes. *Martin v. The Kroger Co.*, 65 F.Supp.2d 516, 537 (S.D. Tex. 1999).

Contrary to Respondent's argument, Petitioner's discriminatory promoting practices were part of the charge (R. 92). In fact, Respondent addressed Petitioner's failure to promote claim in its position statement. (R. 471). Respondent's position statement was followed by Petitioner's response and also discusses his complaints about the failure to promote him. (R. 477). If there was any question that failure to promote was part of Petitioner's EEOC charge, there is no doubt that it stemmed from the EEOC investigation when all parties addressed the issue during the investigation.

Likewise, Petitioner's discharge reasonably flowed from the EEOC investigation. Petitioner provided the EEOC with information about his discharge when he filed his complaint and during the EEOC's investigation. (R. 458). All the evidence surrounding Petitioner's termination was provided to the EEOC in the form of the various communications between the undersigned and Respondent from February through March of 2002. Therefore, Petitioner's discharge was

properly before the District Court as it reasonably flowed from the EEOC's investigation.

If the Fifth Circuit had affirmed the District Court's decision on this ground it would have ignored over 40 years of case law from the 5th Circuit alone. See *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). *Clark v. Kraft Foods*, Inc., 18 F.3d 1278, 1280 (5th Cir. 1994); *National Association of Government Employees v. City Public Service Board of San Antonio, Texas*, 40 F3d 698, 711-12 (5th Cir. 1994); *Thomas v. Tex. Dep't of Criminal Justice*,220 F.3d 389, 395 (5th Cir. 2000); *Perseveranda Clayton v. Rumsfeld*, 106 Fed. Appx. 268, 271, 2004 U.S. App. Lexis 16011 (5th Cir. 2004)(unpublished); *Pacheco v. Norman Y. Mineta, Etc.*, 448 F.3d 783, 789 (5th Cir. 2006); *O'Neal v. Roadway Express*, 181 Fed. Appx. 417, 419: 2006 U.S. App. Lexis 11688(5th Cir. 2006)(unpublished); *Preston v. Texas Department of Family and Protective Services*, 2007 U.S. App. Lexis 2870, 7 (5th Cir. 2007)(unpublished); and *Mayfield v. US Department of Veterans Affairs*, 2007 U.S. Dist. Lexis 13318, 15 (5th Cir. 2007). It would also have contradicted case law from other circuits. See *Obradovich v. Federal Reserve Bank of New York*, 569 F.Supp. 785, 789 (S.D. of N.Y., 1983)(citing *Silver v.Mohasco Corp.*, 602 F.2d 1083, 1090 (2nd Cir. 1979), rev'd on other grounds, 447 U.S. 807, 100 S.Ct. 2486 (1980) quoting *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 107 n.10 (2nd Cir. 1978)) and *Belcher v. Bassett Furniture Industries, Inc.*, 376 F.Supp. 593, 596 (W.D. Virginia 1974).

Respondent's alternative argument to deny certiorari is merely a smoke screen, as even the Fifth

Circuit recognized the weakness of this argument by failing to address it.

CONCLUSION

Other than attempting to cloud all the issues, Respondent completely fails to explain why the evidence submitted by Petitioner would not allow a jury to infer that his rights had been violated. Therefore, for all the foregoing reasons, and the reason specified in Petitioner's Petition for writ of certiorari, Petitioner respectfully requests that the Supreme Court grant certiorari, vacate the decision of the United States Court for the Fifth Circuit, remand this matter to the district court for a trial on the merits and for such other and further relief that Petitioner may be entitled.

Respectfully submitted,

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